

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 16, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RHONDA C.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant.

No. 1:22-cv-3022-EFS

**ORDER GRANTING PLAINTIFF'S
SUMMARY-JUDGMENT MOTION,
DENYING DEFENDANT'S
SUMMARY-JUDGMENT MOTION,
AND REMANDING FOR
ADDITIONAL PROCEEDINGS**

Plaintiff Rhonda C. appeals the denial of benefits by the Administrative Law Judge (ALJ). Because the ALJ did not provide adequate reasons supported by substantial evidence for discounting Plaintiff's symptom testimony and certain medical opinions, the ALJ reversibly erred. The Court reverses the decision of the ALJ and remands the matter for further proceedings.

¹ For privacy reasons, Plaintiff is referred to by first name and last initial or as "Plaintiff." See LCivR 5.2(c).

I. Five-Step Disability Determination

A five-step evaluation determines whether a claimant is disabled.² Step one assesses whether the claimant is engaged in substantial gainful activity.³ Step two assesses whether the claimant has a medically severe impairment or combination of impairments that significantly limit the claimant's physical or mental ability to do basic work activities.⁴ Step three compares the claimant's impairment or combination of impairments to several recognized by the Commissioner to be so severe as to preclude substantial gainful activity.⁵ Step four assesses whether an impairment prevents the claimant from performing work she performed in the past by determining the claimant's residual functional capacity (RFC).⁶ Step five assesses whether the claimant can perform other substantial gainful work—work that exists in significant numbers in the national economy—considering the claimant's RFC, age, education, and work experience.⁷

² 20 C.F.R. §§ 404.1520(a), 416.920(a).

³ *Id.* §§ 404.1520(a)(4)(i), (b), 416.920(a)(4)(i), (b).

⁴ *Id.* §§ 404.1520(a)(4)(ii), (c), 416.920(a)(4)(ii), (c).

⁵ *Id.* §§ 404.1520(a)(4)(iii), (d), 416.920(a)(4)(iii), (d).

⁶ *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

⁷ *Id.* §§ 404.1520(a)(4)(v), (g), 416.920(a)(4)(v), (g).

II. Background

In July 2018, Plaintiff filed applications for benefits under Title 2 and Title 16, claiming disability based on post-traumatic stress disorder (PTSD), depression, and bipolar disorder.⁸ Plaintiff alleged an onset date of February 1, 2016.⁹ After the agency denied her applications initially and on reconsideration, Plaintiff requested a hearing before an ALJ.

In January 2021, ALJ Gregory Moldafsky held a hearing at which Plaintiff and a vocational expert testified.¹⁰ In April 2021, the ALJ issued a written decision denying Plaintiff's disability application.¹¹

A. Five-Step Findings

As to the sequential disability evaluation, the ALJ found as follows.

- Step one: Plaintiff had not engaged in substantial gainful activity since February 1, 2016, the alleged onset date.
- Step two: Plaintiff had the following medically determinable severe impairments: PTSD, anxiety disorder, depressive disorder, and personality disorder.

⁸ AR 289, 340.

⁹ AR 296.

¹⁰ AR 43–73.

¹¹ AR 13–24.

1 • Step three: Plaintiff did not have an impairment or combination of
2 impairments that met or medically equaled the severity of one of the
3 listed impairments.

4 • RFC: Plaintiff had the RFC to perform a full range of work at all
5 exertional levels, subject to the following nonexertional limitations:

6 simple (as defined in the D.O.T. as SVP ratings 1 and 2),
7 routine, and repetitive tasks in a work environment that is
8 not fast paced or has strict production quotas (e.g., work that
9 is goal based or measured by end result). Additionally, she is
limited to no more than incidental interaction with the
general public, no more than occasional interaction with co-
workers and supervisors.¹²

10 • Step four: Plaintiff could perform past relevant work as a folding machine
11 operator.

12 • Step five: considering Plaintiff's RFC, age, education, and work history,
13 Plaintiff could perform work that existed in significant numbers in the
14 national economy, such as photo-copy machine operator, office helper,
15 and marker.

16 **B. Persuasiveness/Credibility Findings**

17 In his analysis, the ALJ found the following medical opinions persuasive:

18 • the August 2019 and February 2020 opinions of the reviewing state-
19 agency psychological consultants,

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23 ¹² AR 17.

- 1 • the August 2018 opinion of examining psychologist Steven Olmer, PhD,
- 2 and
- 3 • the November 2014 opinion of examining psychologist Thomas Genthe,
- 4 PhD.

5 The ALJ found the following medical opinions unpersuasive:

- 6 • the June 2019 opinion of examining psychologist Tamsyn Bowes, PsyD,
- 7 • the opinions dated August 2018 through December 2020 of treating
- 8 counselor Amy Zook, MS, and
- 9 • the June 2012 opinion of consultative examiner Jay Toews, EdD.

10 The ALJ also found Plaintiff's subjective complaints and alleged limitations
11 not persuasive.¹³ The ALJ found that Plaintiff's medically determinable
12 impairments could reasonably be expected to cause some of the alleged symptoms,
13 but that her statements concerning the intensity, persistence, and limiting effects
14 of those symptoms were not entirely consistent with the medical evidence and
15 other evidence in the record.

16 **III. Standard of Review**

17 A district court's review of the Commissioner's final decision is limited.¹⁴
18 The Commissioner's decision is set aside "only if it is not supported by substantial
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22 ¹³ AR 22.

23 ¹⁴ 42 U.S.C. § 405(g).

evidence or is based on legal error.”¹⁵ Substantial evidence is “more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁶ Moreover, because it is the role of the ALJ—and not the Court—to weigh conflicting evidence, the Court upholds the ALJ’s findings “if they are supported by inferences reasonably drawn from the record.”¹⁷ The Court considers the entire record, and the Court may not reverse an ALJ decision due an error that “is inconsequential to the ultimate nondisability determination.”¹⁸

IV. Analysis

Plaintiff argues the ALJ erred by improperly evaluating the medical opinions of Dr. Bowes and Ms. Zook, as well as by improperly rejecting Plaintiff’s symptom reports.¹⁹

A. Medical Opinions: Plaintiff shows consequential error.

While an ALJ need not “give any specific evidentiary weight . . . to any medical opinion(s),” the ALJ must consider and evaluate the persuasiveness of all

¹⁵ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

¹⁶ *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

¹⁷ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

¹⁸ *Molina*, 674 F.3d at 1115. *See also Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007).

¹⁹ *See generally* ECF No. 12.

1 medical opinions.²⁰ The factors for evaluating the persuasiveness of medical
 2 opinions include, but are not limited to, supportability, consistency, relationship
 3 with the claimant, and specialization.²¹ Supportability and consistency are the
 4 most important factors, and the ALJ is required to explain how both of these
 5 factors were considered as to each medical source.²²

6 (1) Supportability. The more relevant the objective medical evidence
 7 and supporting explanations presented by a medical source are to
 8 support his or her medical opinion(s) or prior administrative medical
 9 finding(s), the more persuasive the medical opinions or prior
 10 administrative medical finding(s) will be.

11 (2) Consistency. The more consistent a medical opinion(s) or prior
 12 administrative medical finding(s) is with the evidence from other
 13 medical sources and nonmedical sources in the claim, the more
 14 persuasive the medical opinion(s) or prior administrative medical
 15 finding(s) will be.²³

16 Typically, the ALJ may, but is not required to, also explain how the other factors
 17 were considered.²⁴

18 **1. Tasmyn Bowes, PsyD**

19 In June 2019, Tasmyn Bowes, PsyD, performed a psychological evaluation of
 20 Plaintiff, which included the administration of a Trails A and B test, a Rey-15 test,
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22 ²⁰ 20 C.F.R. §§ 404.1520c(a), (b), 416.920c(a), (b).

23 ²¹ *Id.* §§ 404.1520c(c)(1)–(5), 416.920c(c)(1)–(5).

²² *Id.* §§ 404.1520c(b)(2), 416.920c(b)(2).

²³ *Id.* §§ 404.1520c(c)(1)–(2), 416.920c(c)(1)–(2).

²⁴ *Id.* §§ 404.1520c(b)(2), 416.920c(b)(2).

1 a Beck Depression Inventory, and a Becks Anxiety Inventory.²⁵ Dr. Bowes
2 diagnosed Plaintiff with PTSD, bipolar disorder, and persistent depressive
3 disorder, “chronic major depression, severe.”²⁶ Dr. Bowes opined that Plaintiff had
4 a severe limitation in her ability to perform activities within a schedule, maintain
5 regular attendance, and be punctual within customary tolerances without special
6 supervision. Dr. Bowes also opined Plaintiff had a marked limitation in her ability
7 to (a) understand, remember, and persist in tasks by following detailed
8 instructions, (b) communicate and perform effectively in a work setting,
9 (c) maintain appropriate behavior in a work setting, and (d) complete a normal
10 workday and workweek without interruptions from psychologically based
11 symptoms.²⁷

12 In June 2019, the state agency hired a consulting psychologist to review
13 Dr. Bowes’ report.²⁸ The reviewing psychologist agreed that medical evidence
14 supported Dr. Bowes’ diagnoses as well as the severity and functional limitations
15 she assessed.²⁹

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19 ²⁵ AR 889–900.

20 ²⁶ AR 892.

21 ²⁷ AR 892.

22 ²⁸ AR 905–06.

23 ²⁹ AR 905–06.

1 ***a. ALJ's Finding & Analysis***

2 The entirety of the ALJ's analysis regarding Dr. Bowes' medical opinion was
3 as follows:

4 I find the opinion of Tamsyn Bowes, Psy.D., unpersuasive insofar as
5 the claimant has as much as marked limitations due to her mental
6 health symptoms, as this is out of proportion to the type and degree of
treatment needed and mental status examination findings showing no
significant deficits in fund of knowledge, abstract thought,
concentration, and memory skills.³⁰

7 ***b. Supportability Factor***

8 Despite being required to expressly consider supportability as a factor, the
9 ALJ failed to do so here.³¹ This constitutes reversible legal error.³² In determining
10 whether to affirm an ALJ's decision, the Court is constrained to the reasons and
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14 ³⁰ AR 21 (cleaned up).

15 ³¹ An ALJ must consider and articulate how persuasive she found each medical
16 opinion, including whether the medical opinion was consistent with and supported
17 by the record. 20 C.F.R. §§ 404.1520c(a), (b), (c), 416.920c(a), (b), (c); *Woods v.*
18 *Kijakazi*, 32 F.4th 785, 792 (9th Cir. 2022).

19 ³² *See* 20 C.F.R. §§ 404.1520c(b)(1), 416.920c(b)(1) (“[W]e will explain how we
20 considered the supportability and consistency factors”); *see also Trevizo v.*
21 *Berryhill*, 871 F.3d 664, 676 (9th Cir. 2017) (holding that the ALJ's failure to
22 consider the applicable factors under the prior regulations, including the
23 supportability of the opinion, constituted reversible legal error).

1 supporting explanation offered by the ALJ.³³ And the ALJ did not articulate his
 2 persuasiveness findings or cite to supporting evidence in a way that would permit
 3 the Court to determine whether such findings are supported by substantial
 4 evidence.³⁴ Moreover, as discussed below, even if this error were deemed harmless,
 5 additional errors require reversal.

6 ***c. Consistency Factor***

7 The ALJ failed to explain how normal showings in “fund of knowledge,
 8 abstract thought, concentration, and memory skills” could undermine Dr. Bowes’
 9 opinions regarding Plaintiff’s abilities in other areas of functioning, such as
 10 maintaining regular attendance, communicating and performing effectively in a
 11 work setting, maintaining appropriate workplace behavior, and completing a
 12 normal work schedule without interruptions from mental-health symptoms.³⁵

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 15 ³³ See *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (recognizing court
 16 review is constrained to the reasons the ALJ gave).

17 ³⁴ See *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996); *Embrey v. Bowen*, 849
 18 F.2d 418, 421–22 (9th Cir. 1988); *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir.
 19 2003) (“We require the ALJ to build an accurate and logical bridge from the
 20 evidence to her conclusions so that we may afford the claimant meaningful review
 21 of the SSA’s ultimate findings.”).

22 ³⁵ See *Embrey*, 849 F.2d at 421–22 (requiring the ALJ to identify the evidence
 23 supporting the found conflict to permit the Court to meaningfully review the ALJ’s

Likewise, the ALJ neither explained why Plaintiff's ongoing mental-health counseling and prescribed medications were inconsistent with Dr. Bowes' opinion, nor indicated what "type and degree" of treatment would be necessary to be considered "proportionate" to the limitations assessed.³⁶

d. Type & Degree of Treatment

Throughout his persuasiveness analysis (not just when assessing Dr. Bowes' medical opinion), the ALJ relied on "the type and degree of treatment needed, including ongoing therapy and the claimant's prescribed medication."³⁷ A claimant's course of treatment, including an inadequately explained failure to seek treatment, is a relevant factor for the ALJ to consider when assessing the claimant's symptom reports.³⁸ But the ALJ did not articulate any evidence suggesting someone with the asserted impairments would receive a different type

finding); *see also Ghanim v. Colvin*, 763 F.3d 1154, 1164 (9th Cir. 2014) (finding the ALJ erred by rejecting the claimant's symptoms resulting from anxiety, depressive disorder, and PTSD on the basis that claimant performed cognitively well during examination and had a generally pleasant demeanor).

³⁶ *Embrey*, 849 F.2d at 421–22 ("The ALJ must do more than offer his conclusions. He must set forth his own interpretations and explain why they, rather than the doctors', are correct.").

³⁷ AR 21.

³⁸ 20 C.F.R. §§ 404.1529(c)(3)–(4) 416.929(c)(3)–(4).

1 or degree of treatment, nor does the Court’s own review of the record reveal any
2 such evidence, which would likely need to be introduced through a medical expert
3 qualified to assess the medications and other treatment methods at issue.³⁹

4 Additionally, “it is a questionable practice to chastise one with a mental
5 impairment for the exercise of poor judgment in seeking rehabilitation.”⁴⁰ When
6 an ALJ relies on a lack of treatment to discount medical evidence and/or the
7 claimant’s symptom reports, the ALJ cannot ignore probative evidence in the
8 record indicating an alternative explanation for why the claimant did not pursue
9 additional treatment.⁴¹ Here, the record contained evidence suggesting that
10 Plaintiff’s “anxiety and mistrust makes it difficult to find appropriate treatment, as
11 she has significant anxiety about taking medications and a variety of anxieties in
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16 ³⁹ See *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975) (recognizing that an
17 ALJ is “not qualified as a medical expert” and should not go outside the record for
18 purposes of “making his own exploration and assessment as to the claimant’s
19 [mental] condition”).

20 ⁴⁰ *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1209–1300 (9th Cir.
21 1999).

22 ⁴¹ See *Fair v. Bowen*, 885 F.2d 597, 603-04 (9th Cir. 1989); SSR 18-3p: Titles II and
23 XVI: Evaluation of Symptoms in Disability Claims.

1 trusting health providers.”⁴² Absent additional evidence, or at least a more
2 detailed and meaningful explanation for why the current evidence of record shows
3 Plaintiff’s mental-health treatment was inconsistent with the evidence being
4 rejected, “the type and degree of treatment needed” was not a valid basis for
5 assessing the persuasiveness of medical opinions.

6 **2. Amy Zook, MS**

7 From August 2018 through December 2020, Plaintiff’s treating counselor,
8 Amy Zook, MS, supplied several forms and letters regarding Plaintiff’s mental
9 impairments, the associated symptoms, and their impact on Plaintiff’s functional
10 abilities.⁴³ Ms. Zook indicated Plaintiff’s symptoms could vary but that Plaintiff’s
11 mental impairments—primarily bouts of increased depression—would present
12 several significant limitations for purposes of fulltime employment. For instance,
13 as Plaintiff points out on appeal, Ms. Zook opined that Plaintiff had marked to
14 severe limitations in her ability to

- 15 (a) perform activities within a schedule, maintain regular attendance
16 and be punctual within customary tolerances,
17 (b) interact appropriately with the general public,

18 ⁴² See AR 1302 (Sept. 2019); *see also*, e.g., AR 1306 (June 2019: noting “anxiety
19 about prescriptions”).

20 ⁴³ See AR 1314–16 (Aug. 2018 Mental-RFC Assessment); AR 1304–11 (June 2019
21 Function Report – Adult – Third Party); AR 1301–03 (Sept. 2019 letter); AR 1273–
22 76 (Aug. 2020 Mental Source Statement); AR 1262–65 (Dec. 2020 Mental Source
23 Statement).

- (c) understand and remember detailed instructions,
- (d) work in coordination with or proximity to others without being distracted by them,
- (e) complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods, and
- (f) get along with co-workers or peers without distracting them or exhibiting behavioral extremes.⁴⁴

Ms. Zook also opined that Plaintiff would likely be off task 21–30% of the time during a normal workweek and was likely to miss an average of four or more days of work per month.⁴⁵ Ms. Zook repeatedly explained that despite periods of improvement and higher levels of functioning, Plaintiff was still unable to consistently perform and was likely to miss “substantial amounts of time at work” due to episodes of increased depression and/or anxiety.⁴⁶

In finding Ms. Zook’s opinions unpersuasive, the ALJ found the opined limitations were “out of proportion to the type and degree of treatment needed and mental status examination findings showing no significant deficits in fund of knowledge, abstract thought, concentration, and memory skills.”⁴⁷ The ALJ

⁴⁴ ECF No. 12 at 16–17 (formatting altered) (citing AR 1262–63, 1273–74).

⁴⁵ AR 1264, 1275.

⁴⁶ *See, e.g.*, AR 1265.

⁴⁷ *See* AR 21 (explaining Ms. Zook’s opinions were discounted for the same reasons as Dr. Bowes’ opinion).

1 noted—without going into detail—that Plaintiff’s treatment included ongoing
2 therapy and prescribed medication.

3 The ALJ’s reasons for discounting Ms. Zook’s opinions suffer from the same
4 flaws as those discussed above regarding Dr. Bowes’ opinion.⁴⁸ Despite being
5 required to do so, the ALJ failed to expressly consider the supportability factor
6 while assessing Ms. Zook’s opinions.⁴⁹ The ALJ also failed to explain why either
7 Plaintiff’s level of care or the cited mental-status findings (showing normal results
8 for “fund of knowledge, abstract thought, concentration, and memory skills”) are
9 inconsistent with the limitations assessed by Ms. Zook, particularly those
10 limitations that Ms. Zook clearly tied to Plaintiff experiencing episodes of increased
11 depression and/or other mood problems.

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16 ⁴⁸ As the ALJ’s decision and the parties’ arguments all appear to treat Ms. Zook as
17 a medical source, the Court presumes that Ms. Zook, who is both Plaintiff’s
18 counselor and the program director for a wellness house, is a licensed healthcare
19 worker who qualifies as a medical source. *See* 20 C.F.R. §§ 416.902(i), 404.1502(i)
20 (each defining “medical source”). Regardless, the Court’s decision would be the
21 same even if Ms. Zook were to qualify only as a “nonmedical source.” *See id.*
22 §§ 416.902(j), 404.1502(j).

23 ⁴⁹ 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2).

1 **3. Rebekah Cline, PsyD**

2 Although neither party addressed the issue, the Court notes that the ALJ
3 failed to make the requisite persuasiveness findings for the psychological
4 evaluation that was conducted by Rebekah Cline, PsyD, on January 21, 2015.⁵⁰
5 This medical opinion predates the alleged onset date of February 1, 2016, but the
6 ALJ found persuasive Dr. Genthe's opinion, which was rendered several months
7 earlier. As such, on remand, the ALJ should expressly address Dr. Cline's medical
8 opinion.

9 **4. Consequential Error**

10 The ALJ erred by failing to meaningfully explain his consideration of the
11 medical-opinion evidence and why he discounted the medical opinions at issue.
12 This leaves the Court unable to assess whether the ALJ's decision is supported by
13 substantial evidence. Further, the vocational-expert testimony establishes that
14 Plaintiff would have been found disabled if the assessed RFC included the
15 additional limitations opined by Dr. Bowes and/or Ms. Zook.⁵¹ The ALJ's errors are
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20 ⁵⁰ See AR 941–45. The ALJ did, however, cite this psychological evaluation while
21 reciting Plaintiff's treatment history. See AR 19 (citing AR 943).

22 ⁵¹ See, e.g., AR 69 (vocational expert testifying that employers typically "accept no
23 more than one absence per month").

1 therefore consequential and warrant reversal with further proceedings on
2 remand.⁵²

3 On remand, the ALJ must meaningfully articulate and explain his
4 consideration of the supportability and consistency factors as to each medical
5 source, including Dr. Cline.⁵³ If the ALJ again finds a medical opinion less
6 persuasive (or otherwise discounts it) based on a perceived inconsistency, the ALJ
7 must identify the inconsistency and explain why it tends to undermine the medical
8 opinion at issue.⁵⁴ The ALJ should take special care to explain his reasoning when
9 relying upon normal findings in mental-status examinations to discount asserted
10 mental-health limitations.⁵⁵

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13 ⁵² See *Molina*, 674 F.3d at 1115. See also *Lingenfelter v. Astrue*, 504 F.3d 1028,
14 1035 (9th Cir. 2007).

15 ⁵³ See 20 C.F.R. §§ 404.1520c, 416.920c; *Woods*, 32 F.4th at 792.

16 ⁵⁴ See *Ghanim*, 763 F.3d at 1164; *Embrey*, 849 F.2d at 421–22 (requiring the ALJ to
17 identify the evidence supporting the found conflict to permit the court to
18 meaningfully review the ALJ’s finding).

19 ⁵⁵ See *Ford v. Saul*, 950 F.3d 1141, 1156 (9th Cir. 2020) (comparing psychologist’s
20 mental-health findings against findings from other mental-health professionals);
21 *Diedrich v. Berryhill*, 874 F.3d 634, 641 (9th Cir. 2017) (noting that courts do “not
22 necessarily expect” someone who is not a mental-health professional to document
23 observations about the claimant’s mental-health symptoms); *Orn v. Astrue*, 495

1 If the ALJ again discounts a medical opinion based on the type and degree of
2 Plaintiff's treatment, the ALJ must explain how substantial evidence in the record
3 indicates a different type and/or greater level of treatment would be expected if the
4 medical opinion were fully credited. In such event, the ALJ must also expressly
5 address whether, and to what extent, Plaintiff's mental impairments are
6 themselves responsible for a lack of increased treatment. To this end, if the ALJ
7 finds it would be helpful, the Court recommends the ALJ call a mental-health
8 medical expert who is qualified to assess what courses of treatment, including the
9 type and dosage of medications prescribed, could be reasonably expected when
10 presented with similar circumstances.

11 **B. Symptom Reports: Plaintiff shows error.**

12 The ALJ's weighing of the medical evidence necessarily impacted his
13 sequential analysis, and the Court need not analyze Plaintiff's remaining claims.
14 Even so, to provide additional guidance on remand, the Court briefly addresses the
15 Commissioner's assertion that, because of evidence of malingering, the ALJ was
16 not required to provide specific, clear, and convincing reasons for rejecting
17 Plaintiff's symptom reports.⁵⁶ The Court disagrees.

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20 F.3d 615, 634 (9th Cir. 2007) (requiring examination notes to be read in their
21 proper context).

22 ⁵⁶ See ECF No. 13 at 5. See also *Ghanim*, 763 F.3d at 1163 (holding the clear-and-
23 convincing standard applies absent affirmative evidence of malingering).

1 The Commissioner is correct that under Ninth Circuit precedent, if the
2 record contains “affirmative evidence” of malingering, the clear-and-convincing
3 standard of review will not apply to the ALJ’s assessment of a claimant’s symptom
4 reports.⁵⁷ The Commissioner also accurately points out that, here, the ALJ noted
5 Plaintiff “was assessed with probable symptom exaggeration, ADD/ADHD by
6 history, anxiety disorder . . .”⁵⁸ Yet, this assessment was written in 2012 by
7 Dr. Toews, whom the ALJ found unpersuasive. Even more, Dr. Toews’ assessment
8 of “probable symptom exaggeration” does not appear to be based on any objective
9 evidence in the record. In support, Dr. Toews merely explained, “She was a bit
10 impatient. She does appear to be an opportunist. Disability seeking is
11 suspected.”⁵⁹ But Dr. Toews was not able to review any of Plaintiff’s records, and it
12 does not appear that Dr. Toews administered any kind of test designed to measure
13 objective signs of malingering, exaggeration, or the like.

14 Moreover, Dr. Toews’ suspicion regarding symptom exaggeration is
15 seemingly contradicted by other medical findings. In November 2104, Dr. Genthe
16 wrote that Plaintiff “appeared relatively genuine in her responses,” explaining that
17 the results of the administered Personality Assessment Inventory “did not indicate
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20 ⁵⁷ See *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1160 n.1 (9th Cir.
21 2008).

22 ⁵⁸ AR 18; *see also* AR 448.

23 ⁵⁹ AR 447.

1 an attempt to portray herself in a more negative light than warranted.”⁶⁰ In
2 January 2015, Dr. Cline noted that Plaintiff’s results on an administered Rey-15
3 test “minimizes the likelihood that she is malingering at this time.”⁶¹ Similarly, in
4 June 2019, Dr. Bowes found a subsequent Rey-15 test “suggests no evidence of
5 malingering,” and Plaintiff “seemed open and honest in presentation.”⁶²

6 Given the context of the entire record—and the ALJ’s rejection of Dr. Toews’
7 opinion—the Court finds Dr. Toews’ conjecture regarding Plaintiff’s “probable
8 symptom exaggeration” amounts to neither “affirmative evidence” of malingering
9 nor substantial evidence that could rationally support a malingering finding.⁶³

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12 ⁶⁰ AR 931. AR 933.

13 ⁶¹ AR 942.

14 ⁶² AR 891, 893.

15 ⁶³ *Cf. Austin v. Saul*, 818 F. App’x 725, 728 (9th Cir. 2020) (unpublished) (“We thus
16 do not consider [an] unexplained notation to constitute affirmative evidence of
17 malingering. Nor do we equate a claimant’s possible exaggerations regarding the
18 severity of his symptoms with affirmative evidence of malingering.”); *cf. also id.* at
19 729 (Vandyke, C.J. concurring in part and dissenting in part) (“I diverge from the
20 majority in this case because I believe the review of the ALJ’s consideration of [the
21 claimant]’s testimony should be for ‘substantial evidence’ because of the affirmative
22 evidence of malingering in the record.”); *Makoviney v. Saul*, 830 F. App’x 192, 195
23 (9th Cir. 2020) (unpublished) (applying the substantial-evidence standard to an

1 On remand, if the ALJ discount's Plaintiff's symptom testimony because of
2 symptom exaggeration and/or any other form of malingering, the ALJ shall clearly
3 state as much and explain how the record supports such a finding. If the ALJ does
4 not make an express finding of malingering and again discounts Plaintiff's
5 symptoms on remand, the ALJ must articulate clear and convincing reasons for
6 doing so.⁶⁴ General findings are insufficient; the ALJ must identify what
7 symptoms are being discounted and what evidence undermines these symptoms.⁶⁵
8 Additionally, when assessing Plaintiff's mental health symptoms, the ALJ is
9 encouraged to expressly address the issue of waxing and waning symptoms.

10 V. Conclusion

11 Plaintiff establishes the ALJ reversibly erred. However, questions of fact
12 remain; the record does not clearly establish that Plaintiff is disabled. As such, the
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17 ALJ's finding of malingering); *Schow v. Astrue*, 272 F. App'x 647, 651–52 (9th Cir.
18 2008) (unpublished) (concluding that examination findings which were “mixed at
19 best” did not constitute affirmative evidence of malingering).

20 ⁶⁴ *Ghanim*, 763 F.3d at 1163 (quoting *Lingenfelter*, 504 F.3d at 1036).

21 ⁶⁵ *Id.* (quoting *Lester*, 81 F.3d at 834, and *Thomas v. Barnhart*, 278 F.3d 947, 958
22 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why he discounted
23 claimant's symptom claims)).

1 Court remands this matter for further proceedings.⁶⁶ On remand, the ALJ is to
2 conduct the sequential evaluation anew, beginning at step two, consistent with this
3 order.

4 Accordingly, **IT IS HEREBY ORDERED:**

- 5 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is
6 **GRANTED.**
- 7 2. The Commissioner's Motion for Summary Judgment, **ECF No. 13**, is
8 **DENIED.**
- 9 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff.
- 10 4. The decision of the ALJ is **REVERSED** and this matter is
11 **REMANDED** to the Commissioner of Social Security for further
12 proceedings pursuant to sentence four of 42 U.S.C. § 405(g).
- 13 5. The case shall be **CLOSED.**

14 IT IS SO ORDERED. The Clerk's Office is directed to file this order and
15 provide copies to all counsel.

16 DATED this 16th day of February 2023.

17 

18 EDWARD F. SHEA
19 Senior United States District Judge
20

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22 ⁶⁶ See *Leon v. Berryhill*, 800 F.3d 1041, 1045 (9th Cir. 2017); *Garrison v. Colvin*,
23 759 F.3d 995, 1020 (9th Cir. 2014).